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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/003,915
Filing Date: November 02, 2001
Appellant(s): MAURO ET AL.

Charles Ruggiero
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 1 October 2007 appealing from the Office action mailed 6 October 2005.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,559,189	BAKER, JR. et al.	5-2003
6,335,012	FISCHETTI et al.	1-2002

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-7, 10-11, 13-14, 19-23, 25-27, 29-32, and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baker, Jr. et al. (6,559,189).

Baker discloses a tampon, as described in column 13, lines 53-54, comprising a composition disposed in the tampon, as described in column 7, lines 50-52 and 54-55. The composition comprises an anti-bacterial agent and a finishing agent. The anti-bacterial agent is a quaternary ammonium compound, as described in column 5, line 64, to column 7, lines 12, specifically alkyl dimethyl benzyl ammonium chloride and alkyl dimethyl ethylbenzyl ammonium chloride. The finishing agent is a nonionic surfactant, polyethylene glycol, as described in column 5, lines 54-56 and 62. The composition further comprises a preservative, as described in column 5, lines 22-27. Baker discloses the composition of the claimed invention, and the antibacterial properties are inherent in the chemicals comprising the composition. Baker therefore inherently discloses a composition effective to neutralize the production of TSST-1 toxin and reduce *Staphylococcus aureus* bacteria growth, and fulfills all limitations of the claims.

Baker discloses the amount of anti-bacterial agent as based on the total weight of the composition, as described in column 30, lines 38-41, invention but remains silent as to the amount of anti-bacterial agent as based on the total weight of the tampon. It would have been obvious to one of ordinary skill in the art at the time of invention to make the tampon of Baker comprising 0.01% to 5% by weight of the anti-bacterial agent, since it has been held that where the general conditions of the claim are

disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art.

Baker discloses the amount of finishing agent as based on the total weight of the composition, as described in column 30, lines 33-33, invention but remains silent as to the amount of finishing agent as based on the total weight of the tampon. It would have been obvious to one of ordinary skill in the art at the time of invention to make the tampon of Baker comprising 0.01% to 10% by weight of the finishing agent, since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art.

Claims 15-16 and 33-34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Baker, Jr. et al. (6,559,189) as applied to claims 14 and 32 above, and further in view of Fischetti et al. (6,335,012).

Baker discloses all aspects of the claimed invention with the exception of the surfactant being a polyoxyethylene fatty acid ester. Baker discloses the surfactant may be a polyoxyethylene sorbital ester, as disclosed in column 5, lines 36-38.

Fischetti discloses polyoxyethylene fatty acid ester and polyoxyethylene sorbital ester as being art-recognized equivalent surfactants, as described in column 11, lines 14-16, which are suitable for use in tampons, as described in column 12, lines 20-21 and 26.

It would therefore be obvious to one of ordinary skill in the art at the time of invention to have the surfactant of Baker comprise a polyoxyethylene fatty acid ester, as

taught by Fischetti, since the examiner takes official notice of the equivalence of polyoxyethylene fatty acid ester and polyoxyethylene sorbital ester for their use as surfactants in tampons, and the selection of any of these equivalents would be within the level of ordinary skill in the art.

(10) Response to Argument

In response to the Appellant's argument that Baker fails to disclose the synergistic combination of the claimed antibacterial agent and finishing agent, it is noted that no evidence has been provided of a synergistic relationship between the antibacterial agent and the finishing agent, or of any unexpected results. The present claims recite the extremely broad ranges of 0.01-5 wt. % of the antibacterial agent and 0.01-10 wt. % of the finishing agent. The present specification discloses on pages 12-13, Table 1, reduced bacterial growth for tampons with 1.0 wt. % of the antibacterial agent and 2.5 wt. % of the finishing agent, as compared to tampons with 0.25 wt. % of the antibacterial agent and 2.5 wt. % of the finishing agent, or 1.0 wt. % of the antibacterial agent and 0.25 wt. % of the finishing agent. Since the claimed ranges encompass the concentrations of antibacterial and finishing agents that resulted little reduction in bacterial growth, as shown in Table 1, there is no evidence of the claimed ranges providing any synergistic relationship or unexpected results.

In response to the Appellant's argument that Baker fails to disclose the specific concentrations recited in the present claims, it is noted that Baker teaches the combination of the antibacterial agent and the finishing agent for use in a tampon.

Optimization of the concentrations of the antibacterial and finishing agents to produce the most effective combination would be obvious to one of ordinary skill in the art.

In response to the Appellant's argument that the claimed ranges of percentage by weight of the antibacterial agent and the finishing agent are critical, and therefore nonobvious, it is again noted that the claimed ranges are extremely broad, and include percentages shown in Table 1 of the present specification to result in little reduction in bacterial growth. The claimed ranges of percentage by weight of the antibacterial agent and the finishing agent are therefore not shown to be critical or nonobvious.

In response to the Appellant's argument that antibacterial properties are inherent to the chemicals comprising the claimed composition, it is noted that the identical chemical composition will exhibit the same properties. Baker discloses the identical compositions as the present claims, specifically the antibacterial agents alkyl dimethyl benzyl ammonium chloride and alkyl dimethyl ethylbenzyl ammonium chloride (see column 5, line 64, to column 7, lines 12), and the finishing agent polyethylene glycol (see column 5, lines 54-56 and 62).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/Lynne Anderson/

Examiner, Art Unit 3761

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